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Mudajaya Corp Bhd v Leighton Contractors (M) Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24C-5–02 OF 2015
MARY LIM J
8 APRIL 2015

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Building and Construction Law — Construction contracts — Adjudication of payment disputes — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Whether construction of power plants come within meaning of 'construction contract' and 'construction work' — Whether payment dispute to be referred to adjudication under the CIPAA — Whether construction contracts for power plants exempted under exemption order — Whether contract deemed to be government construction contract only where government a party to it

D

Civil Procedure — Costs — No order as to costs — Novel case — Parties seeking clarity and interpretation of relatively new law

E

Statutory Interpretation — Canons of construction — Legislation to be read as a whole — Legislation to be construed according to its plain meaning — Purposive approach when plain meaning in doubt — Interpretation Acts of 1948 and 1967 s 17A

F

Statutory Interpretation — Subordinate legislation — Canons of construction — orders to be read against parent Act

G

The Energy Commission conducted a bidding process in relation to the construction of a 1000 megawatt power plant at Tanjung Bin, Johor. Tanjung Bin Energy Sdn Bhd won the bid and subsequently appointed a consortium of companies including the plaintiff to carry out the project. The plaintiff then subcontracted the turbine hall civil works to the defendant. Disputes arose between the parties and the defendant invoked the provisions of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Under s 40 of the CIPAA, the Minister had issued an exemption order which took effect from 14 April 2014. The plaintiff contended that the exemption order completely exempted government construction contracts as specified in the First Schedule from all the provisions of the CIPAA. The government construction contracts specified in the First Schedule are those contracts for any construction works that relate to national security or security related facilities. The plaintiff contended that since the First Schedule specifically included 'power plants' within its meaning of 'national security or security

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related facilities', the subcontract in question which related to the construction of a power plant, enjoyed that exemption. According to the plaintiff, since the Energy Commission comprised members appointed by the Minister, the power plant in question was actually in the control and regulation of the government although it was constructed by private entities. The defendant on the other hand contended that the exemption order would only apply if the government was a party to the contract, which was not the case here. Hence, the plaintiff sought a declaratory order to the effect that the subcontract came within the terms of the exemption order.

Held, dismissing the application with no orders as to costs:

(1) Legislation must be read as a whole; any specific provision must be read with or against the rest of the Act or in the case of any orders issued, such orders must be read against the substantive or parent Act. In so doing, the court must strive to give a harmonious reading to the law enacted by Parliament, and that would include any orders made by the relevant Minister under that relevant law. The exemption order issued by the Minister contained two schedules. The schedules must be read together with the rest of the exemption order; and with the rest of or other substantive provisions of the CIPAA; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 referred (see para 19).

(2) Legislation must be construed according to its plain meaning and understanding. However, when that plain meaning is in doubt, a purposive approach must be explored. A reading which would advance the intent and purpose for which the legislation was enacted in the first place ought to be adopted; provided of course such an approach does not strain or do violence to the language used in the legislation. This principle is encapsulated in s 17A of the Interpretation Acts of 1948 and 1967; *Andrew Lee Siew Ling v United Overseas Bank (M) Sdn Bhd* [2013] 1 MLJ 449 referred (see para 20).

(3) Construction contracts relating to the construction of power plants come within the meaning of 'construction work' and 'construction work'. Hence, the Act applied to the contract and subcontracts related to the construction of the Tanjung Bin power plant. The subcontract on the turbine hall civil works was not spared. Payment disputes arising between the parties here could therefore be referred to adjudication under the CIPAA (see para 29).

(4) It is apparent from para 2 of the order that what is exempted are 'government construction contract'. In order to be a 'government construction contract', the contract must first of all be a construction contract as defined in s 4; and more important, it must be one where the government, be it the federal or any of the state government, is a party.

Only then, it makes sense why the exemption order has referred to the phrase 'government construction contract' and not just construction contract (see paras 34 & 36).

(5) Bearing in mind the purpose of the CIPAA, and that as a starting position it is intended to cover all construction contracts including those entered into by the government, a more strict and narrow as opposed to a liberal and extensive interpretation ought to be applied when construing exemption provisions and exemption or exclusion orders; unless there are clear express terms to the contrary. This approach and these principles accord with s 17A of the Interpretation Acts of 1948 and 1967 on interpreting legislations purposively. It is the intention that only those government construction constructs relating to power plants that will be exempted; *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 referred (see paras 43 & 47).

(6) The case was novel and the parties were before the court to seek clarity and interpretation of a still relatively new law. Thus, there should be no order as to costs (see para 48).

[Bahasa Malaysia summary

Suruhanjaya Tenaga menjalankan proses bidaan berkaitan pembinaan 1000 loji kuasa megawatt di Tanjung Bin, Johor. Tanjung Bin Energy Sdn Bhd yang berjaya mendapatkan bidaan itu dan seterusnya melantik konsortium syarikat termasuk plaintif untuk melaksanakan projek tersebut. Plaintif kemudian mensubkontrak kerja-kerja awam Dewan Turbin kepada defendan. Pertikaian antara pihak-pihak dan defendan menggunakan peruntukan-peruntukan Akta Pembayaran Industri Pembinaan dan Adjudikasi 2012 ('APIPA'). Di bawah s 40 APIPA , Menteri telah mengeluarkan perintah pengecualian yang mula berkuat kuasa dari 14 April 2014. Plaintif berhujah bahawa perintah pengecualian itu dikecualikan sepenuhnya kontrak pembinaan kerajaan sebagaimana yang dinyatakan dalam perintah pengecualian daripada semua peruntukan APIPA. Kontrak pembinaan kerajaan yang dinyatakan dalam perintah pengecualian adalah kontrak-kontrak tersebut untuk apa-apa kerja pembinaan yang berkaitan dengan keselamatan negara atau kemudahan keselamatan yang berkaitan. Plaintif berhujah bahawa oleh kerana perintah pengecualian secara spesifik termasuk 'power plants' dalam maksud 'national security or security related facilities', kontrak kecil yang dipersoalkan berkaitan dengan pembinaan loji kuasa, menikmati pengecualian tersebut. Menurut plaintif, oleh kerana Suruhanjaya Tenaga itu terdiri daripada ahli-ahli yang dilantik oleh Menteri, loji kuasa yang dipersoalkan itu sebenarnya dalam kawalan dan kawal selia kerajaan meskipun ia dibina oleh entiti swasta. Defendan sebaliknya berhujah bahawa perintah pengecualian hanya terpakai jika kerajaan adalah pihak kepada kontrak, yang mana bukan kesnya di sini. Justeru, plaintif mohon perintah deklarasi untuk memberi kesan agar kontrak

kecil dalam terma perintah pengecualian itu. A

Diputuskan, menolak permohonan tanpa perintah dengan kos:

(1) Perundangan perlu dibaca secara keseluruhan; apa-apa peruntukan spesifik perlu dibaca dengan atau terhadap Akta lain atau dalam kes mana-mana perintah dikeluarkan, perintah tersebut perlu dibaca terhadap ('Akta') induk atau substantif. Dalam berbuat begitu, mahkamah perlu berusaha untuk memberikan bacaan yang harmoni dengan undang-undang yang digubal oleh Parlimen, dan ini akan termasuk apa-apa perintah yang dibuat oleh Menteri berkaitan itu di bawah undang-undang yang berkaitan. Perintah pengecualian yang dikeluarkan oleh Menteri mengandungi dua jadual. Jadual-jadual tersebut perlu dibaca bersama dengan perintah pengecualian lain; dan peruntukan substantif lain APIPA ; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 dirujuk (lihat perenggan 19). B C D

(2) Badan perundangan perlu mentafsirkan menurut maksud dan pemahaman harfiahnya. Walau bagaimanapun, apabila maksud harfiah adalah diragui, pendekatan bertujuan perlu diteliti. Pembacaan yang menunjukkan niat dan tujuan badan perundangan itu digubal pada mulanya patut digunakan; dengan syarat pendekatan sedemikian tidak membebankan atau merosakkan bahasa yang digunakan dalam perundangan. Prinsip ini terangkum dalam s 17A Akta Tafsiran 1948 dan 1967; *Andrew Lee Siew Ling v United Overseas Bank (M) Sdn Bhd* [2013] 1 MLJ 449 dirujuk (lihat perenggan 20). E F

(3) Kontrak pembinaan berkaitan pembinaan loji kuasa terangkum dalam maksud 'construction work' dan 'construction work'. Justeru, Akta tersebut terpakai kepada kontrak dan kontrak kecil berkaitan pembinaan loji kuasa Tanjung Bin. Kontrak kecil berhubung kerja-kerja awam Dewan Turbin tidak terlepas. Bayaran pertikaian yang timbul antara pihak-pihak di sini boleh dirujuk kepada adjudikasi di bawah APIP (lihat perenggan 29). G

(4) Adalah jelas daripada perenggan 2 perintah itu bahawa apa yang dikecualikan adalah 'government construction contracts'. Bagi tujuan menjadi 'government construction contracts', kontrak itu terlebih dahulu perlu meruakan kontrak pembinaan seperti ditafsirkan dalam s 4; dan lebih penting lagi, ia adalah suatu kontrak di mana kerajaan, sama ada persekutuan atau mana-mana kerajaan negeri, adalah satu pihak. Barulah ia masuk akal kenapa perintah pengecualian merujuk kepada frasa 'government construction contracts' dan bukan hanya kontrak pembinaan (lihat perenggan 34 & 36). H I

(5) Dengan mengambil kira tujuan APIPA, dan bahawa sebagai kedudukan

permulaan ia bertujan untuk meliputi semua kontrak pembinaan termasuk yang dimasukkan oleh kerajaan, maka pentafsiran yang lebih tegas dan ketat berbanding kepada yang liberal dan meluas patut digunakan apabila mentafsir peruntukan-peruntukan pengecualian dan pengecualian atau perintah-perintah pengecualian; kecuali terdapat sebaliknya terma-terma nyata yang jelas. Pendekatan ini dan prinsip-prinsip tersebut sesuai dengan s 17A Akta Tafsiran 1948 dan 1967 dalam mentafsir perundangan dengan tujuan. Adalah menjadi hasrat bahawa hanya yang mana membina pembinaan kerajaan yang berkaitan dengan loji kuasa yang akan dikecualikan *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 dirujuk (lihat perenggan 43 & 47).

(6) Kes itu adalah novel dan pihak-pihak di hadapan mahkamah untuk mendapatkan penjelasan dan tafsiran undang-undang masih agak baru. Oleh itu, tidak patut ada perintah mengenai kos (lihat perenggan 48).]]

Notes

For cases on canons of construction, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2124–2125.

For cases on canons of construction in general, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1736–1767.

For cases on construction contracts, see 1(3) *Mallal's Digest* (5th Ed, 2015) para 4052.

For cases on no order as to costs, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 2562–2565.

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Sdn Bhd [2013] 1 MLJ 449, FC (folld)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Inland Revenue Commissioners v Gittus [1920] 1 KB 563, CA (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 4, 40, 40(a), (b), First Schedule, Second Schedule

Electricity Act 1949 (repealed by ESA 1990) ss 15, 15(2)

Electricity Supply (Successor Company) Act 1990 s 3

Electricity Supply Act of 1990 ss 2, 4, 9

Energy Commission Act 2001 s 2

Interpretation Acts of 1948 and 1967 s 17A

Mohanadass Kanagasabai (Kalashini Sandrasegaran with him) (Mohanadass Partnership) for the plaintiff.
Gananathan Pathmanathan (Olivia Loh with him) (Gananathan Loh) for the defendant.

Mary Lim J:

INTRODUCTION

[1] As aptly put by learned counsel for the plaintiff, 'the issue in this case is a narrow but important one in the context of the exemption orders to the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). By *Gazette* Notification P U (A) 104 of 2014, the Minister exercised his powers under s 40 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and issued an exemption order which took effect from 14 April 2014.

[2] The plaintiff is seeking a declaratory order to the effect that the sub contract that it had entered with the defendant comes within the terms of that exemption order. If the plaintiff is correct in its assertions, it will mean that any payment dispute between the plaintiff and the defendant cannot be referred to adjudication under the CIPAA.

FACTS

[3] When the papers were first filed, the parties were embroiled in a different payment dispute where an adjudicator had already been appointed. Although that payment dispute has been withdrawn, the defendant has included that payment claim in the latest payment dispute between the parties. This second payment dispute presently awaits the appointment of an adjudicator.

[4] The general background facts leading to the award of what is in essence a sub contract between the parties and the existence of payment dispute(s) between them are not in dispute. This is how the sub contract in question came to pass.

[5] The Energy Commission conducted a competitive restrictive bidding process in relation to the construction of a 1000 megawatt power plant at Tanjung Bin, Mukim Serkat, Johor Darul Takzim. A company known as Transpool Sdn Bhd, a wholly owned subsidiary of Malakoff Corporation Bhd, won the bid. Transpool Sdn Bhd is now known as Tanjung Bin Energy Sdn Bhd.

[6] Tanjung Bin Energy Sdn Bhd subsequently entered into various agreements with other parties of which two bear mention here. The first was a power purchase agreement ('PPA') with Tenaga Nasional Bhd ('TNB'). By that PPA, Tanjung Bin Energy Sdn Bhd, as an independent power producer ('IPP') agreed to finance, design, construct, own, operate and maintain an electricity generating facility with a nominal capacity of 1,000 megawatts net to be located at Tanjung Bin, Mukim Serkat, Johor Darul Takzim to provide generating capacity and electricity energy to TNB ('the project').

[7] In the second turnkey agreement made with its wholly owned subsidiary, Tanjung Bin Energy Issuer Sdn Bhd, Tanjung Bin Energy Issuer Sdn Bhd as 'owner' agreed to procure the execution of the project on a turnkey basis, and administer and manage the development of the project. The owner, in turn, appointed a consortium of companies comprising Alstom Power Systems SA, Alstom Services Sdn Bhd, Shin Eversendai Engineering (M) Sdn Bhd and the plaintiff as the EPCC ('Engineering, Procurement and Construction Contract') contractor to carry out the project. The plaintiff then sub contracted the turbine hall civil works to the defendant.

[8] Disputes arose between the parties and the defendant invoked the provisions of the CIPAA. Just after these proceedings were initiated, the adjudication proceeding before adjudicator Raymond Mah were withdrawn. However, as there is still another adjudication claim for some RM14m pending, the parties agreed that the present proceedings are still relevant.

[9] It is the plaintiff's contention that the exemption order completely exempts those government construction contracts 'as specified' in the First Schedule from all the provisions of the CIPAA. The government construction contracts specified in the First Schedule are those contracts for any construction works that relate to national security or security related facilities. It is the plaintiff's contention that since the First Schedule has specifically included 'power plants' within its meaning of 'national security or security related' facilities, the sub contract in question which is obviously related to the construction of a power plant, equally enjoys that exemption.

[10] Learned counsel for the plaintiff further submitted that the sub contract is also necessarily a 'government construction contract' after having regard to how electricity and energy supply is generated, administered and thereby how electricity, energy or power generating facilities are constructed in Malaysia. According to learned counsel, the supply or generation of electricity in Malaysia is no longer undertaken by the government (whether the federal government or any of the state government) with the privatisation of such activities and services. Pursuant to s 3 of the Electricity Supply (Successor Company) Act 1990 ('Act 448'), all property, rights and liabilities of the

predecessor to TNB, the National Electricity Board were now vested, inter alia, in TNB. Prior to this, the National Electricity Board was charged under s 15 of the Electricity Act 1949 ('Act 116') with inter alia, the duty of 'establishing, managing and working electrical installations belonging to the board, and such other installations and apparatus as may be acquired by the board'. For this purpose, the National Electricity Board was authorised under sub-s 15(2) of Act 116 to, inter alia, 'purchase, construct, reconstruct, maintain and operate supply lines, generating stations, transformer stations, and all other appropriate stations, buildings and works ...'.

[11] Act 116 has since been repealed by the Electricity Supply Act of 1990 ('Act 447'). Act 447 is an Act providing for 'the regulation of the electricity supply industry, the supply of electricity at reasonable prices, the licensing of any electrical installation, the control of any electrical installation, plant and equipment with respect to matters relating to the safety of persons and the efficient use of electricity and for purposes connected therewith'. Under Act 447, a commission was set up with functions and duties spelt out in s 4. Those functions and duties pertain to matters relating to electricity supply or generation.

[12] Aside from the fact that a statutory authority has been established to generate and/or supply electricity, s 9 of Act 447 required every person who uses, works or operates or permits to be used, worked or operated any installation; or any person who supplies electricity from any installation to or for the use of any other person to first procure a licence for the same. 'Installation' is defined in s 2 to mean 'the whole of any plant or equipment under one ownership or, where a management is prescribed, the person in charge of the same management, designed for the supply or use, or both, as the case may be, of electricity, including prime movers, if any, with all necessary plant, buildings and land in connection therewith, pipe line, supply line and consuming apparatus, if any'. This means 'power plants' fall within the meaning of the term 'installation'.

[13] Subsequently, the Energy Commission Act 2001 ('Act 610') established another commission. This time, as its name suggests, the Energy Commission with body corporate status and bearing the name of 'Suruhanjaya Tenaga' was established. Amongst the functions and powers of this commission were the functions 'to implement and enforce the energy supply laws', and 'to regulate all matters relating to the electricity supply industry and to protect any person from dangers arising from the generation, production, transmission, distribution, supply and use of electricity as provided under the electricity supply laws'. The 'electricity supply laws' are defined in s 2 to mean the Act 447 and all subsidiary legislation made under that Act; and any other legislation relating to electricity. Through a licensing mechanism, the Energy

Commission now oversees all matters relating to energy and electricity supply and generation. The 'Suruhanjaya Tenaga' licenses, regulates and enforces the laws relating to energy supply.

[14] It was submitted by learned counsel for the plaintiff that with that legal framework where these legislations no longer contemplate the government constructing or even operating any installation, and that includes a power plant, it would defeat the object and object of the exemption order to the extent of rendering it futile or otiose if the court were to insist that the government must be a party to the construction contract to construct the installation or power plant before the exemption order applies. It would be a case of insisting 'on the implausible'.

[15] It was however, suggested that because 'Suruhanjaya Tenaga' comprised members appointed by the Minister who are responsible to the Minister and who are required to act on the Minister's directions, the power plant in question is actually in the control and regulation of the government. This remains the case even though the power plant is constructed by private entities which the present parties, undeniably are.

[16] In any case, the plaintiff urged the court to find that the sub contract should be exempted because of the far-reaching consequences of the CIPAA. An unpaid sub contractor is said to be able to present an adjudication award against a principal or, 'go slow' in its execution of the contract works. In learned counsel's words, 'the result could well be a knock-on showdown of the entire project or commercial pressure on other parties involved in the project. All of which would well compromise a project which has security concerns'. Learned counsel contended that the obvious purpose of the exemption order was 'to ensure that contracts involving power plants operate according to the contractual framework and do not suffer the interference of the rights conferred under the CIPAA. Such a purpose cannot be achieved if the exemption order is limited in its operation to the apex contract only'.

[17] The defendant disagrees contending that this is not a contract impacting national security and/or that in any event, the exemption order only applies if the government is a party to the contract. Since the government is not a party to this sub contract, the sub contract is not exempted in which case, the adjudication is perfectly valid and in order.

DETERMINATION

[18] I start with two basic principles of statutory interpretation. These principles are relevant and applicable whether interpreting substantive or

subsidiary legislation; including any orders issued under any of these legislations.

[19] The first principle is that the legislation must be read as a whole; any specific provision must be read with or against the rest of the Act or in the case of any orders issued, such orders must be read against the substantive or parent Act. In so doing, the court must strive to give a harmonious reading to the law enacted by Parliament, and that would include any orders made by the relevant Minister under that relevant law. In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, the Court of Appeal citing *Inland Revenue Commissioners v Gittus* [1920] 1 KB 563, reminded of this principle. Although it was there discussing of a schedule to a legislative enactment, that it is part of that enactment and that it falls to be construed according to its own language and purpose. However, that still requires the schedule to be read together with the substantive sections of the Act and the court must give a reading as would advance the intent and purpose of the Act. In this case, the exemption order issued by the Minister contains two schedules. This would mean that the schedules must be read together with the rest of the exemption order; and with the rest of or other substantive provisions of the CIPAA.

[20] The second principle of statutory interpretation is that legislation must be construed according to its plain meaning and understanding. However, when that plain meaning is in doubt, a purposive approach must be explored. A reading which would advance the intent and purpose for which the legislation was enacted in the first place ought to be adopted; provided of course such an approach does not strain or do violence to the language used in the legislation. This principle is encapsulated in s 17A of the Interpretation Acts of 1948 and 1967 ('Act 388'). For guidance on this principle, I need go no further than to cite the Federal Court's decision in *Andrew Lee Siew Ling v United Overseas Bank (M) Sdn Bhd* [2013] 1 MLJ 449. At p 458, the Federal Court said:

> On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, inter alia, as follows:
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> > In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
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> > (1) Legislation is always to be understood first in accordance with its plain meaning.
> >
> > (2) Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

(5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

The choice prescribed in s 17A of '... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. 'Thus, it is only when a provision is capable of bearing two or more meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision, such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation ...'

[21] It is of utmost importance to bear in mind that in the first place, the CIPAA is a piece of legislation passed 'to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'. This provision of remedies for recovering payment through ,inter alia, adjudication which is the 'speedy mechanism' envisaged under the CIPAA for resolving disputes is a central feature of the CIPAA.

[22] Another significant feature of the CIPAA is the extent of the application of the Act. According to s 2, the Act applies to all written construction contracts so long as the construction work envisaged in those contracts are executed anywhere within the territory of Malaysia. That execution need not even be completely done in Malaysia; it may only be in part. All that is required is some carrying out of the works within Malaysia's territory. This is what s 2 say:

2 This Act applies to every construction contract made in writing relating to

construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the government.

[23] Section 2 presents yet another important feature; it expressly provides for the application of the Act to construction contracts entered into by the government. The term 'government' is defined in s 4 to mean 'the federal government or the state government'. So, even construction contracts made by the federal or any of the state government are not exempted from the application of the CIPAA.

[24] Yet, another interesting feature of the Act is the extensive meanings given to the term 'construction work'. In s 4, it is defined to mean 'a construction work contract or construction consultancy contract'. These two terms are further defined in s 4 to respectively mean 'a contract to carry out construction work'; and 'a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services'. From these two definitions, it can be readily gathered that the essence of construction contracts is that it always relates to construction work.

[25] The term 'construction work' is also defined in s 4; and, it means:

> the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of—
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> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
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> (b) any road, harbour works, railway, cableway, canal or aerodrome;
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> (c) any drainage, irrigation or river control work;
>
> (d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
>
> (e) any bridge, via duct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,
>
> and includes—
>
> (A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and
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> (B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e).

[26] From these provisions, two critical points can be made about the salient features of the CIPAA.

[27] First, it is significant to note that the CIPAA applies to all construction contracts regardless of who the contracting parties may be. Second, while the definitions of the various terms found in the Act are generally exhaustive in character, it is nevertheless evident from the meanings ascribed to these terms that the arms of application of the CIPAA are long, wide and extensive. Effectively, this means that the CIPAA applies to all written construction contracts relating to construction works which are carried out in Malaysia even though such works may only be carried out to some small extent in Malaysia's territory.

[28] The focus of the CIPAA is on the type of works; and this, in itself, is extensive as it ranges from and includes preparatory work, the sourcing of materials, equipment and manpower to the execution of the works by putting up the physical infrastructure to dismantling any of the same. The Act disregards the entities behind the contracts for those works and who in fact the contracting parties may be, up or down the contracting chain.

[29] From the plain reading of these definition provisions in the CIPAA, it may reasonably be concluded that construction contracts relating to the construction of power plants does come within the meaning of 'construction work' and 'construction work'. Hence, the Act applies to the contract and sub contracts related to the construction of the 'electricity generating facility with a nominal capacity of 1,000 megawatts net to be located at Tanjung Bin, Mukim Serkat, Johor Darul Takzim to provide generating capacity and electricity energy to TNB'. The sub contract between the parties before the Court on the turbine hall civil works is not spared. Payment disputes that arise between the present parties may therefore be referred to adjudication under the CIPAA.

[30] As a corollary to this, it is relevant to note that even if this contract was made between private parties and any of the governments, the Act will still apply. It would still be open to the parties, up and down that same contracting chain, to refer any payment dispute to adjudication under the CIPAA.

[31] Therefore, in order to say otherwise, it must be shown either the contracting parties or the contract in question is exempted. This is where s 40 comes in. Section 40 empowers the Minister to exempt any person or contract from the application of the Act. This is what s 40 say:

> 40 The Minister may, upon considering the recommendation of the KLRCA, by order published in the Gazette, exempt—

(a) any person or class of persons; or

(b) any contract, matter or transaction or any class thereof,

from all or any of the provisions of this Act, subject to such terms and conditions as may be prescribed.

[32] In exercise of his power under para s 40(b), the Minister issued an exemption order which was published in P U (A) 104 of 2014. That exemption order took effect from 14 April 2014.

[33] Although s 40 empowers the Minister to exempt 'any person or class of persons'; or 'any contract, matter or transaction or any class thereof' from the operation of 'all or any of the provisions of the Act'; or even both; the Minister exercised his powers under para 40(b) for this exemption order. This is evident from the opening terms of the exemption order which is reproduced in full here:

IN exercise of the powers conferred by paragraph 40(b) of the Construction Industry Payment and Adjudication Act 2012 [Act 746], the Minister, upon considering the recommendation of the Kuala Lumpur Regional Centre for Arbitration, makes the following order:

Citation and commencement

1.

(1) This Order may be cited as the Construction Industry Payment and Adjudication (Exemption) Order 2014.

(2) This Order comes into operation on 15 April 2014.

Exemption

2.

(1) A government construction contract as specified in the first schedule is exempted from all provisions of the Act.

(2) Subject to subparagraph (3), a government construction contract as specified in the second schedule is exempted from the application of subsections 6(3), 7(2), 10(1), 10(2), 11(1) and 11(2) of the Act from 15 April 2014 to 31 December 2015.

(3) The exemption referred to in subparagraph (2) is subject to the following terms and conditions:

(a) a payment response under section 6 of the Act shall be served on the unpaid party within thirty days of the receipt of the payment claim;

(b) the right to refer a dispute to adjudication by the unpaid party or

non-paying arty under subsection ((2) of the Act shall only be exercised after the expiry of the period to serve a payment response under subsubparagraph (a);

(c) The respondent referred to in section 10 of the Act, within thirty days from the receipt of the adjudication claim, shall–

(i) serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant; and

(ii) provide the adjudicator with a copy of the adjudication response together with any supporting document; and

(d) the claimant referred to in section 11 of the Act, within thirty days from the receipt of the adjudication response–

(i) may serve a written reply to the adjudication response together with any supporting document on the respondent; and

(ii) shall provide the adjudicator with a copy of the adjudication reply together with any supporting document.

FIRST SCHEDULE

A contract for any construction works–

(a) that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances;

(b) that relates to national security or security related facilities which includes the construction of military and police facilities, military bases and camps, prison and detention camps, power plant and water treatment plant.

SECOND SCHEDULE

A contract for any construction works as defined under the Act with the contract sum of twenty million ringgit (RM20,000,000) and below.

[34] It is apparent from para 2 of the order that what is exempted here are first and foremost 'government construction contract'. The term, 'government construction contract' is however, not defined; whether in the exemption order or anywhere in the Act. Nevertheless, it would be fair and reasonable to say that in order to be a 'government construction contract', the contract must first of all be a construction contract as defined in s 4; and more important, it must be one where the government, be it the federal or any of the state government, is a party. Otherwise, it would be just like any other construction contract and there would have been no need to cite or refer such a construction contract as a 'government construction contract'. As discussed earlier and subject to what the court has to say about the exemption order, payment disputes in government construction contracts, just like all other construction contracts,

are also subjected to the regimes of adjudication as established under the CIPAA.

[35] Learned counsel for the plaintiff has urged the court to take stock of the circumstances and legal framework under which electricity, energy and power are supplied, generated, administered and managed in the country. According to learned counsel, because of the privatisation of these utilities, it is no longer contemplated for the government to be seen constructing or even operating any installation, including a power plant such as the present plant to be at Tanjung Bin. If the court were to insist that the government must be a party to the construction contract here before the exemption order applies, learned counsel submitted that it would defeat the object and object of the exemption order to the extent of rendering it futile or otiose.

[36] With respect, the court disagrees. This position as described by learned counsel is not one which Parliament and the Minister who issued the exemption order could not have been not familiar with or aware of. Yet, the term, 'government construction contract' is used deliberately and with care. Such use cannot be ignored. For a construction contract to fall within the meaning of and be considered as a 'government construction contract', it logically must be one where the government, federal or state, is a party to. Only then, it makes sense why the exemption order has referred to the phrase 'government construction contract' and not just construction contract. In fact, this is the plain meaning of the term 'government construction contract' used in exemption order.

[37] Be that as it may, it is also clear from the exemption order that it is not the person in the name of 'government' that is exempted, although the government may well have been exempted despite the provisions of s 2. As observed earlier, it was of course, open to the Minister to exempt the government, state or federal, as the government falls within the meaning of a 'person or the class of persons'. If, however, the exemption order was to exempt the government as the 'person or the class of persons', the order would have said so. More particularly, the Minister would have exercised his powers under para 40(a) and this may well mean an exemption of every construction contract that the government is a party to.

[38] But, that is not the case here. What we have instead is an exemption of a 'contract, matter or transaction or any class thereof' which is entered into by the government. The exemption applies only to particular and specific types of government construction contracts. The particular types of government construction contracts are those specified in the First and Second Schedules. And, even in respect of such contracts, it is only those contracts which fulfill the elements in any of the categories of contracts mentioned in the First and

Second Schedules that are exempted. In the case of the First Schedule government construction contracts, a full exemption; while in the case of the Second Schedule government construction contracts, a limited and prescribed conditional exemption. Such exemption, if there is one in the first place, will be enjoyed by all involved along the contractual chain, regardless the identity of the contracting party.

[39] There are two categories of contracts in the First Schedule; their requisite elements being:

(a) in the case of the first category, the contracts must be contracts for any construction works that are '(a) carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances'; or

(b) in the case of the second category, the contracts must be contracts for any construction works that relate to '(b) ... national security or security related facilities which includes the construction of military and police facilities, military bases and camps, prison and detention camps, power plant and water treatment plant'.

[40] In the case of the Second Schedule, there is only one category and the requirement is that the construction contract must be 'for any construction works as defined under the Act with the contract sum of twenty million ringgit (RM20,000,000) and below'.

[41] In the case of contracts, matters or transactions which fall within the First Schedule, it is a full exemption from all the provisions of the Act. In the case of contracts, matters or transactions which fall within the Second Schedule, the exemption is only from certain provisions of the Act. Even then, the exemption is only for a limited period, that is, from 15 April 2014–31 December 2015. The contracts in the Second Schedule are further subject to sub-para (3) of the exemption order. Subparagraph (3) provides for a different time line for the adjudication process for payment disputes from these construction contracts. For instance, instead of ten days for the service of a payment response on the unpaid party, the non-paying party is given thirty days to do the same.

[42] Although it is 'the contract, matter or transaction or any class thereof' that the Minister intends to exempt, the Minister has made it clear that it is not just any 'the contract, matter or transaction or any class thereof' that is exempted. What is actually exempted is not only a construction contract within the meaning of s 4 but a construction contract that has either of the elements mentioned in the First Schedule. If the court were to accept and adopt the reading and interpretation urged by learned counsel for the plaintiff, there

would have been no need to describe the exempted construction contracts as 'government construction contract'. All that would have been required would have been to describe the contract by reference to the nature of works. As discussed above, that is not the case here.

[43] The instant application is for a declaratory order to the effect that the contract in question is exempted from the Act. Bearing in mind the purpose of the CIPAA, and that as a starting position it is intended to cover all construction contracts including those entered into by the government, a more strict and narrow as opposed to a liberal and extensive interpretation ought to be applied when construing exemption provisions and exemption or exclusion orders; unless there are clear express terms to the contrary. This approach and these principles accord with s 17A of the Interpretation Acts 1948 and 1967 (Act 388) on interpreting legislations purposively.

[44] It is the view of this court that exemption clauses or orders must be read narrowly and restrictively having regard to the purpose, object and intent of the underlying substantive law which is the CIPAA. This was opined by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265. The object and intention of the law in question must always be at the forefront of discussion and any attempt at thwarting that intention should not be tolerated. In the face of clear express provisions on application as found in s 2, it would take clear, decisive terms before the court will say that the law, whether wholly or in part, does not apply.

[45] In the facts of this case, the court can only conclude that what is intended to be exempted are construction contracts entered into by the government. Even then, it is not every construction contract but only those construction contracts that were either built on an urgent or emergency like conditions and circumstances; or that relate to the construction of, inter alia, national security or security related facilities including military camps, prisons, power plants and water treatment plants that are exempted. It is immaterial that the government may no longer be 'persons' entering into contracts for the construction of any of these facilities, a situation which cannot be entirely ruled out; the reading that the court must give to this exemption order must be one which holds equally true for the matters enunciated in (a) and (b); as well as to the Second Schedule. I mention the Second Schedule as the same term 'government construction contract' is also used in relation to those contracts. The court should not be making a special case and giving a special reading when dealing with power plants. The interpretation and construction must hold true in all the categories mentioned in both schedules.

[46] In the absence of clear and explicit terms of exemption to the effect as

asserted by the plaintiff, it must be the case that the Act applies to the construction contract in question and continues to apply by virtue of s 2. Clear and unambiguous words must be used to take the person or the contract out of the application of the Act. More so, when there are the express terms in s 2 on the application and intact of application of the CIPAA.

[47] I must add in passing that Parliament and more so, the Minister, must be taken to be fully aware that electricity, and energy or power supply generation has since been privatised or corporatised. That, as argued by the plaintiff, the government is no longer constructing such facilities. Yet, 'power plants' are deliberately included in the exemption order. This inclusion is intentional and must not be ignored. I can only conclude that it is the intention that only those government construction constructs relating to power plants that will be exempted.

[48] In the circumstances, the application is dismissed. In the matter of costs, I agree with learned counsel for the plaintiff that this case is novel and the parties are before the court to seek clarity and interpretation of this still relatively new law. On such an occasion, there should be no order as to costs; and I so order.

Application dismissed with no orders as to costs.

Reported by Kanesh Sundrum